(1)

Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

JOSEPH F. KWOK,

Petitioner,

v.

NEW YORK CITY TRANSIT AUTHORITY,
TRANSPORT WORKERS' UNION, Local 100/AFL-CIO,
and WILLIE JAMES, President of Local 100/TWU,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LEE NUWESRA
Counsel of Record
ANTONIO MORALES
LEE NUWESRA, LLC
44 Wet 125th Street
Suite 3F
New York, NY 10027
(212) 828-7888
Attorneys for Petitioner

CURRY & TAYLOR ♦ (202) 393-4141 ♦ HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

1. What constitutes knowingly and voluntary waiver of Constitutional or Statutory Rights by an employee?

2. Under what circumstances does a tenured public employee voluntary waive his/her Federal Constitutional Rights?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this petition, the parties are:

Petitioner: Joseph F. Kwok ("Mr. Kwok"), an individual.

Respondents: New York City Transit Authority ("NYCTA"), is a governmental public benefit corporation, created by the State of New York for the purpose of operating transit facilities.

Transport Workers' Union, Local 100/AFL-CIO, ("L.U"), is a labor organization as defined by Article 14 of the New York Civil Service Law, representing NYCTA employees.

Willie James, President of local 100/TWA, an individual.

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IN THE
SUPREME COURT OF THE UNITES STATES

JOSEPH F. KWOK

Petitioner,

V.

NEW YORK CITY TRANSIT AUTHORITY,
TRANSPORTATION WORKERS' UNION,
Local 100/AFL-CIO and Willie James,
President of Local 100/TWU'

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH F. KWOK, Petitioner, by the undersigned counsel, under the appropriate rules of this court, respectfully requests that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is not reported. The opinion and order of the United States

District Court for the Southern District of New York (Pet. App. 3a) is not reported.

JURISDICTION

Original jurisdiction in the U.S. District Court for the Southern District of New York was based upon 28 U.S.C. §§1331, 1343, and 42 U.S.C. § 1983.

The judgment of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) was entered on October 29, 2002. The Second Circuit denied a timely petition for rehearing on December 11, 2002 (Pet. App. 17a). This Court has jurisdiction under 28 U.S.C. §1254(1). This Honorable Court granted a motion for extension of time to submit this petition, to April 14, 2003.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of their life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process law."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 United States Code 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

Federal Rule of Civil Procedure 56 (c)

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on the file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

A. General Background and Description.

In 1987, Mr. Kwok, an Asian American male, was appointed by the New York City Transit Authority "NYCTA" as a train conductor. In 1989, he was promoted as a permanent train operator. He attained his tenure a year later. From 1987 through 10-23-1997, he was an exemplary employee.

The sequence of events that lead to Mr. Kwok's wrongful termination, stem from his scheduled bi-annual physical exam, including a drug/urine test, purportedly under Federal Transportation Agency Regulations, pursuant to the Omnibus Transportation Employee Testing Act of 1991. On 10-15-1997, during the exam Mr. Kwok was not able to provide the employer's required amount of urine specimen as he was unnecessarily interrupted by the lab technician.

Pursuant to FTA Regulation 49 CFR § 40.25 (f) (10) (iv) (A) (1) and (2), if an employee has not provided the required quantity of 45 milliliters of urine for a split specimen colletion, he/she is given the opportunity to drink up to forty ounces of fluid, distributed reasonably through a period of up to 3 hours, or until the employee has provided a new urine specimen, whichever occurs first. After his initial unsuccessful attempt, Mr. Kwok was told that the specimen was not enough and to discard the same. Mr. Kwok was then instructed to go outside, drink water and try to urinate again.

Between 10:00am and 11:30am, Mr. Kwok again attempted to provide the required specimen on at least 3 occasions. He was not successful during these attempts, as the lab technician would interrupt Mr. Kwok after

few minutes. Mr. Kwok suffers from a shy bladder disorder. On October 22, 1997, Mr. Kwok met with his employer's physician, Dr. Genser, and advised him that it normally takes him longer that 3 minutes to urinate.

B. Mr. Kwok's Suspension And His Eventual Wrongful Termination.

On 10-23-1997, Dr. Genser, issued a report to NYCTA indicating that Mr. Kwok refused to provide urine within the allotted time. That same day, NYCTA suspended Mr. Kwok without pay and sought his dismissal. Pursuant to the Collective Bargaining Agreement "CBA", on 10-23-1997 and 10-31-1999, Steps I and III meetings were held by NYCTA, resulting in Mr. Kwok's dismissal.

C. Mr. Kwok's Dealings With His Union Post His Unlawful Termination.

Pursuant to the grievance procedure in the CBA, Mr. Kwok was scheduled for arbitration on November 18, 1997. Between 10-31-1997 and the date of the Arbitration, Mr. Kwok attempted to contact his union's representative by telephone on several occasions to no avail. He also visited the Union Hall, left his name and telephone number, but no one contacted him.

D. The Meeting Of November 18, 1997, The Day Of The Scheduled Arbitration.

On 11-18-1997, Mr. Kwok arrived at the arbitration in the early afternoon, and waited until 6:00 p.m. before anyone acknowledged his presence. Eventually, Mr. Fox, an African American Union Organizer showed up. Without advising Mr. Kwok that he can proceed to arbitration, Mr. Fox said that the

Arbitration Committee has already decided to rule against him, and uphold his termination

Mr. Kwok was told by the Union Representative that a stipulation was waiting for him and if he complied with management's demands, Mr. Kwok's job would be salvaged. The Union's attorney present at the meeting told Mr. Kwok that if he went through with arbitration he will be dismissed and will never be able to hold another Civil Service position. Mr. Kwok was given 5 minutes by NYCTA and the Union to sign the stipulation. Mr. Kwok, with limited high school education, and exemplary employment record, who never used any drugs was advised by his Union and its Attorney to sign an agreement that branded him a Repeat Drug User and upheld his dismissal. They also advised him to enroll in a drug rehabilitation program. They also made him agree that after his graduation from the rehabilitation program, he will be permanently demoted to a non-safety sensitive position for the rest of his career, with no opportunity for advancement ever. The Union and its Attorney had Mr. Kwok waive his rights without explaining the same, or the consequences thereof. The pertinent language of the release is as follow:

> Grievant and the Union jointly and severally hereby release the Transit Authority from any and all claims, whether at law in equity or arising by virtue of contract which they may have or which they may have had heretofore in connection with underlying dispute(s) in case number(s) 9723530051.

Mr. Kwok, however, never agreed to waive any of his Statutory or Constitutional Rights; nor was he given any

reasonable time to consider the same or discuss the stipulation with his private attorney..

E. The Drug Treatment Center And The Union's False Promise to Intercede On His Behalf.

While in the treatment program, Mr. Kwok learned that other similarly situated non Asian employees of NYCTA were treated differently. The other employees were allowed to keep their safety sensitive positions upon their successful completion of the treatment program. When Mr. Kwok brought this disparity to his Union's attention, he was reassured that upon his completion of the program, the Union would rectify the situation. In December of 1998, after Mr. Kwok's wife accompanied him to the Union Hall, the Union representatives, including Mr. Spurges, for the first time, fessed up and advised them that they should retain private counsel as the Union does not intend to take Mr. Kwok's cause any further.

F. The Union Attorney's Concession At The October 11, 2002, Oral Argument Before The Second Circuit Court Of Appeals.

On October 11, 2002, at the scheduled Oral Argument before the Panel of the Second Circuit Court Of Appeals, the attorney representing the Union conceded that under the circumstances of Mr. Kwok's case, the stipulation was not signed voluntary by him. The Union's attorney stated that in the Union's view Mr. Kwok could not have been free of duress, at the time he signed the stipulation on 11-18-1997.

REASONS FOR GRANTING WRIT

This case presents a short and well defined record of important questions of federal law that have not been, but should be settled by this Honorable Court. The questions simply are (a) What constitutes voluntary and knowingly waiver of Constitutional or Statutory Rights by an employee? and, (b) Under what circumstances does a tenured public employee voluntary waive his Federal Constitutional Rights?

What ensued in this matter was a serious misapplication of federal regulation by Respondent Employer, which caused Petitioner's unlawful termination. Petitioner's dismissal was followed by the unfair representation by Respondent Union, which caused Mr. Kwok to involuntary and unknowingly forgo his right to an arbitration hearing. This resulted in labeling Petitioner a repeat drug user, his permanent demotion, and the endurance of a humiliating drug treatment program by Mr. Kwok without just cause.

A government employee's constitutionally protected liberty interest is implicated when the government dismisses him based on charges "that might seriously damage his standing and association in his community", or that might impose "or him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities." Board of Regents v. Roth, 408 U.S. 564,573 (1972); Paul v. Davis, 424 U.S. 693, 706 (1976).

I THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS THAT HAVE CONSIDERED THE ISSUE OF WHAT CONSTITUTES "A KNOWING AND VOLUNTARY" WAIVER OF AN EMPLOYEE'S CONSTITUTIONAL OR STATUTORY RIGHTS SO AS TO PROMOTE FAIRNESS AND UNIFORMITY.

Fairness in applying uniformity in the standard of analyzing questions of Federal law is essential and required to maintaining trust in the justice system as well as the work place. Currently, there is a lack of standardization among the Circuits that considered the "knowingly and willfully" aspects of a valid waiver in Statutory claims.

The Circuit Courts that addressed the issue of what constitutes "a knowing and voluntary" waiver of an employee's Constitutional or Statutory Rights seem to be split. The Fifth, Sixth and Eight Circuits appear to apply "ordinary contract principles" addressing whether a waiver has been entered into "knowingly and willfully." Runyan v National Cash Registrar Corp., 787 F.2d 1039 (6th Cir. 1986) (en banc), cert. denied, 479 U.S. 850 (1986); Lancaster v Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987); EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987).

The Second and Third Circuits, on the other hand, apply to the "totality of circumstances" standard in detrmining whether the waiver is "voluntary" Conventry v. U.S. Steel Corp., 856 F2d 514 (3rd Cir. 1988); Borman v. AT&T Communication, 875 F.2d 399 (2d Cir. 1989) cert. denied, 493 U.S. 924 (1989).

The disagreement between the Circuits occurs in their application when determining whether an employee has voluntarily, knowingly and willingly waived his/her statutory or constitutional rights. Out of this confusion has evolved two different interpretations with their own variations, all of which offer conflicting rationale as to what constitutes a valid waiver.

In determining the validity of a valid waiver under the general principles of contract construction, the Appellate Courts rely on factors such as the clarity and lack of ambiguity of the language. See Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983). They also look to see if there is an absence of fraud, deceit or unconscionable over-reading. Moore v. McGrfaw Edison Co., 804 F.2d 1026, 1033 (8th Cir. 1986).

Appellate Courts that apply the totality of circumstances standard rely on the following non exhaustive enumeration of factors: 1) the Plaintiff's education and business experience, 2) the amount of time the Plaintiff had possession of or access to the agreement before signing it, 3) the role of Plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the Plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law. Coventry v. U.S. Steel Corp., 856 F.2d 514, 522-23 (3rd. Cir. 1988).

II THE SPLITS IN THE CIRCUITS HAVE RESULTED IN IRRECONCILABLE OUTCOMES IN CASES INVOLVING SIMILAR FACTS.

The different splits between the Circuits as to what constitutes a "knowing, voluntary and willing"

waiver, is more than an academic issue. The split is resulting in different results involving cases with similar facts. This case is illustrative. Had Mr. Kwok's case been heard in the Third or Sixth Circuits, his waiver would have been deemed invalid. This is so mainly because of his limited education and lack of business sophistication, and because he did not have enough time to consider the agreement and lacked proper legal counsel.

Public employers as well as private employers should not be able to lightly deprive their employees of their Constitutional or Statutory Rights through flimsy tactics or unsupervised and meaningless waivers thereof. In 1988, Congress recognized this need in relation to releases in Age Discrimination ("ADEA") claims. Title II of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. Sec. 626 (f), imposes specific procedural requirements that must be followed for any such releases to be enforceable.

Under this law, a valid waiver must satisfy all of the following conditions: a) it must be part of an agreement that is written in plain English; b) it must specifically refer to rights or claims arising under the ADEA; c) it cannot ask the employee to waive rights or claims that arise after the waiver is signed; d) the employer must offer consideration (e.g. money or other benefits) for the waiver that is in addition to what the employee would already be entitled to under the employer's existing benefits program; e) the employee must be advised in writing to consult with an attorney prior to signing the waiver; f) the employee must be given at least 21 days to consider the agreement before signing it. But, if the waiver is part of an exit incentive program, employees must be given at least 45 days to

consider and sign; and g) the employee must be given at least 7 days to revoke the agreement after signing it.

Petitioner Kwok respectfully submits that the aforementioned factors, enumerated pursuant to 29 U.S.C. Sec 626 (f) should be required in all employees' agreement that require waivers of their Constitutional or Statutory Rights to be valid and enforceable. There of course can be some modification with regard to the amount of days given employees to consider the agreement. The time should be reasonable, but never less than seven days, and employees should be noticed in writing of their right to seek legal counsel.

The Court of Appeal in this matter upheld the District Court's decision that Mr. Kwok knowingly and voluntarily waived any claims he had against NYCTA, including his Constitutional Rights (Pet. App. 2a). The District Court found that it was undisputed that the language of the stipulation was clear and un-ambiguous, it was one page in length, and that Mr. Kwok received more than he was entitled to under the CBA. It also found that Plaintiff signed the stipulation after he considered it for one-half hour and after it was explained to him by Union Counsel (Pet. App. 12a-13a). The District Court concluded that based on the circumstances surrounding the execution of the release, Mr. Kwok knowingly and voluntary waived any claims he had against NYCTA (Pet. App. 13a). Accordingly, the Court granted Respondents' Summary Judgment Motion.

While the stipulation was one page in length, the pertinent release language was not written in plain English or specified that Mr. Kwok would be waiving his Constitutional Rights. Moreover, Mr. Kwok did not have one half hour to consider the agreement, but rather only

5 minutes (Pet. App. 9a). The Union's lawyer at oral argument before the Second Circuit agreed that whether Mr. Kwok had half an hour or 5 minutes, under the circumstances of his executing the stipulation he was not free of duress no did he voluntarily sign the same.

Mr. Kwok was not represented by private counsel at the time he signed the stipulation. Rather the Union Counsel was present to represent its interest, and he never explained the agreement to Mr. Kwok. Furthermore, the stipulation Mr. Kwok signed did not provide more than what he was entitled to under the CBA. The Agreement he signed branded him a second time drug user and forced him to enter a degrading drug rehabilitation program. As a second time drug user, Mr. Kwok was permanently demoted to cleaning subway cars. Had Mr. Kwok not signed the stipulation, he would have been entitled to a name clearing hearing and reinstatement to his previous position with back pay, and the opportunity for advancement at NYCTA.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on the file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56 (c). As a consequence, the Court's rulings on the motion for summary judgment are patently flawed, defective and erroneous to the extent that they fail to engage in the proper summary judgment analysis proscribed by this Court. In short, the Circuit Court in adopting the District Court's opinion and order committed clear error by making inferences on genuine issues of material fact against Mr. Kwok, a nonmovant, by not applying the appropriate summary judgment standard and by not taking into account evidence in the

summary judgment record which clearly highlighted genuine issues of material fact in dispute. Anderson v.Liberty Lobby, Inc., 447 U.S. 242, 247 (1986).

The District Court also dismissed Mr. Kwok's claim against his Union for failure to fairly represent him. (Pet. App. 13a-15a). Although no discovery was allowed on this issue, as the District Court limited discovery to the "knowingly and voluntary" issue, Mr. Kwok's pleadings and the affidavits attached thereto clearly showed that Petitioner became aware of the Union's true intentions in December 1998. This is coupled with the Union's concession, at oral argument before the Second Circuit, that Mr. Kwok signed the stipulation under duress should have estopped Respondent Union from raising statute of limitation or other defenses with regard to its duty of fair representation. A Union breaches its duty of fair representation when it arbitrarily ignores a meritorious grievance, or that its actions are arbitrary, discriminatory or in bad faith and these actions seriously undermine the arbitral process. Vaca v.Sipes, 385 U.S. 171 190 (1967); Barr v. United Parcel Serv., Inc., 868 F.2d 36, 43 (2d Cir. 1989). Accordingly, the Circuit Court's dismissal of Mr. Kwok's fair representation claim against his Union was also erroneous.

CONCLUSION

THEREFORE, Petitioner Joseph F. Kwok respectfully requests of this Court that it Grant his petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

RESPECTFULLY SUBMITTED,

LEE NUWESRA
Counsel of Record
ANTONIO MORALES
LEE NUWESRA, LLC
44 Wet 125th Street, Suite 3F
New York, New York 10027
(212) 828-7888

No. 01-9006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH F. KWOK,
Plaintiff-Appellant,

v.

NEW YORK CITY TRANSIT AUTHORITY, TRANSPORT WORKERS' UNION, Local 100/AFL-CIO and WILLIE JAMES, President of Local 100/TWU, Defendants-Appellees,

THE CITY OF NEW YORK,
Defendant.

COUNSEL:
Appearing for Appellant: Lee Nuwesra, New York, N.Y.

Appearing for Appellees: Daniel Topper (Martin B. Schnabel, on the brief), Brooklyn, N.Y., for Appellee New York City Transit Authority. Arthur Z. Schwartz, Kennedy, Schwartz & Cure (Elizabeth M. Pilecki, on the brief), New York, N.Y., for Appellees Transport Workers' Union, Local 100/AFL-CIO and Willie James, President.

JUDGES:
PRESENT: HON. JAMES L. OAKES, HON. CHESTER J. STRAUB, Circuit Judges, HON. DAVID G. TRAGER, Judge. *

OPINION:

SUMMARY ORDER

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Plaintiff-Appellant Joseph F. Kwok appeals from a July 20, 2001 judgment of the District Court granting summary judgment in favor of Defendants-Appellees New York City Transit Authority, Transport Worker's Union Local 100/AFL-CIO, and Willie James, President of Local 100/TWU on Plaintiff's claims for violation of his constitutional rights, breach of the duty of fair representation, and breach of fiduciary duty.

After carefully considering all of Plaintiff's contentions on appeal, we hereby AFFIRM the judgment of the District Court for substantially the reasons stated in the District Court's thorough Opinion and Order of July 20, 2001.

* The Honorable David G. Trager of the United States District Court for the Eastern District of New York, sitting by designation.

99 Civ. 2281 (JSM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPH F. KWOK,

Plaintiff,

-v.-

NEW YORK CITY TRANSIT AUTHORITY, TRANSPORT WORKERS' UNION, Local 100/AFL-CIO, and WILLIE JAMES, President of Local 100/TWU, Defendants.

July 20, 2001, Decided

July 23, 2001, Filed

COUNSEL:

For JOSEPH F. KWOK, plaintiff: Lee S. Nuwesra, New York, NY.

For NEW YORK CITY TRANSIT AUTHORITY, defendant: Daniel Topper, New York City Transit Authority, Brooklyn, NY.

For TRANSPORT WORKERS' UNION LOCAL 100/AFL-CIO, defendant: Arthur Z. Schwartz, Kennedy, Schwartz & Cure, P.C., New York, NY.

For WILLIE JAMES, defendant: Howard G. Wien, O'Donnell, Schwartz, Glanstein & Rosen, New York, NY.

For WILLIE JAMES, defendant: David Michael Glanstein, O'Donnell, Schwartz, Glanstein, et al., New York, NY.

For Defendants: Elizabeth Pilecki, Esq., O'Donnell, Schwartz, Glanstein, Rosen, DiPreta & Goldstein, LLP, New York, NY.

JUDGES:
JOHN S. MARTIN, JR., U.S.D.J.

OPINIONBY:
JOHN S. MARTIN, JR.

OPINION:

OPINION and ORDER

JOHN S. MARTIN, Jr., District Judge:

Joseph Kwok ("Plaintiff") brings this action pursuant to *42 U.S.C. § 1983* claiming that the New York City Transit Authority ("NYCTA") violated his property and liberty interests under the Due Process and Equal Protection Clauses of the Fourteenth Amendment by terminating his permanent position and forcing Plaintiff to accept a stipulation reinstating him to a demoted position upon successful completion of a drug treatment program. Plaintiff also claims that these actions were taken in order to discriminate against him because of his race. Plaintiff further brings state law causes of action under Article 14 of the Civil Service Law, N.Y. Civ. Serv. Law § 209-a, claiming that the Transport Workers' Union ("TWU") breached its duty of fair representation and its fiduciary duty to Plaintiff by coercing him into signing the stipulation and by failing to pursue his claim that the stipulation was the result of disparate treatment by NYCTA. Finally, Plaintiff claims that TWU's

President, Willie James ("James"), breached his fiduciary duty to Plaintiff by failing to adequately train his employees and by failing to insure that Plaintiff was adequately represented.

Defendants NYCTA, TWU, and James move for summary judgment. For the reasons set forth below, Defendants' motions are granted.

I. BACKGROUND

NYTCA is a public benefit corporation created by the State of New York for the purpose of operating transit facilities. See N.Y. Pub. Auth. Law § 1201. In December 1987, Plaintiff began employment with NYCTA as a train conductor. In 1989, Plaintiff was promoted to the permanent position of train operator, which is a safety-sensitive position.

In 1994, TWU, Plaintiff's union, executed the CBA at issue here. The CBA provides that NYCTA employees must submit to biannual and/or annual physicals that include drug screening. (Pilecki Aff. Ex. D.) It further provides that a refusal to be tested for drugs or controlled substances constitutes an admission of improper use of such substances, thereby resulting in dismissal from service.

On January 1, 1995, NYCTA adopted the regulations promulgated in the Federal Omnibus Transportation Employee Testing Act (the "FTA regulations"), *49 U.S.C. § 5331*. The FTA regulations set forth detailed drug testing procedures with which all transportation employers must comply. See *49 C.F.R. § 40.10*. As relevant to this action, the FTA regulations provide that 45 milliliters or "cc's" of urine must be collected from an employee under the split sample method, see id. § 40.25(f)(10), which is the method that NYCTA uses, (Genser Aff. P 6.) If the employee fails to provide 45 cc'sof urine, the regulations indicate that the specimen

shall be discarded and that the administering personnel shall direct the employee "to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided the specimen, whichever occurs first." *49 C.F.R. § 40.25(f)(10)(iv)(A)(2)*. Should the employee fail to produce the requisite sample after three hours have passed, the employer must direct the employee to obtain "as soon as possible" an evaluation from a licensed physician for the purpose of determining whether the employee has a medical condition preventing him from providing the sample. Id. § 40.25(f)(10)(iv)(B). "A medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a documented pre-existing psychological disorder, but does not include unsupported assertions of 'situational anxiety' or dehydration." Id. § 40.25(f)(10)(iv)(B)(1). If the physician is unable to find an acceptable medical condition, then the "employee's failure to provide an adequate amount of urine shall be regarded as a refusal to take a test." Id. § 40.25(f)(10)(iv)(B)(2). The examining physician is also required to provide the employer with a statement describing his or her medical conclusions. See id.

On October 15, 1997, Plaintiff attended his 8:00 a.m. physical exam, but was unable to provide 45 cc's of urine. On his first attempt, Plaintiff provided approximately half of the requisite sample, which the collection employee, Deborah Fitzroy ("Fitzroy"), discarded. Fitzroy then instructed Plaintiff to sit in the waiting room, drink water, and produce the sample when ready. Plaintiff alleges that he attempted to provide the sample several more times, but that each time, Fitzroy interrupted him within two to four minutes and told him that his time was up. (Pilecki Aff. Ex. K, at 11.) Fitzroy finally instructed Plaintiff to see a physician

in order to determine whether he was suffering from a medical condition that prevented him from providing the requisite sample.

Plaintiff offers differing accounts of the timing of the morning's events. In his Amended Complaint, Plaintiff states that he urinated at 7:30 a.m. on the morning of his exam, and that that is why he could not produce the first sample in full at 8:00 a.m. (Am. Compl. P 19.) He also alleges in his Amended Complaint that he attempted to give urine three to five additional times over the next three hours. (Am. Compl. P 22.) In his deposition, Plaintiff also stated that he was given up to three hours to provide the sample. (Pilecki Aff. Ex. K, at 11.) However, in his affidavit in opposition to Defendants' motions, Plaintiff claims that he was not asked for his first sample until 10:00 a.m., and that he was given only one-and-a-half hours to provide another sample. (Kwok Aff. P 10.)

As to his subsequent failed attempts to provide urine, Plaintiff alleges that he suffers from a condition known as "shy bladder" that renders him unable to initiate a stream of urine within three minutes, although he did not know of this condition at the time. (Am. Compl. P 19.) It is not clear when Plaintiff learned of this alleged disorder, although he did apparently inform Dr. Alan Genser ("Dr. Genser"), the NYCTA Medical Review Officer, several days following his exam that it normally takes him longer than three minutes to urinate. It is worth noting that Plaintiff has successfully provided urine samples for NYCTA drug tests since 1989.

On October 16, 1997, Dr. Avram Nemetz, a non-NYCTA physician, examined Plaintiff and concluded that Plaintiff did not have a medical condition preventing him from providing the urine sample. On October 22, 1997, Dr. Genser met with Plaintiff and advised him to produce medical documentation

supporting his medical excuse. Plaintiff did not submit such medical documentation, nor has he provided any in opposition to Defendants' motions. n1 On October 23, 1997, Dr. Genser issued a report to NYCTA indicating that Plaintiff refused to provide urine within the allotted time. That same day, NYCTA issued a Disciplinary Action Notification seeking to dismiss Plaintiff.

Plaintiff immediately initiated the grievance procedures set forth in the CBA. Accordingly, on October 23, 1997, and October 31, 1997, Step I and Step III hearings took place in which NYCTA sustained Plaintiff's dismissal. TWU agents represented Plaintiff at both hearings and signed Plaintiff's requests to appeal those decisions.

Pursuant to the grievance procedure, Plaintiff was then scheduled for arbitration before a tripartite panel on November 18, 1997. On November 5, 1994, TWU sent Plaintiff a letter informing him that failure to appear at the arbitration would result in an abandonment of his appeal, and that it was in his best interest to prepare with his union attorney prior to the arbitration hearing. (Pilecki Aff. Ex. G.) The letter also stated that TWU reserves each Monday from 11 a.m. to 5 p.m. for consultation. Although Plaintiff claims that he was unable to obtain assistance from the union prior to the arbitration, he did not take advantage of these consultation services.

On the day of the arbitration hearing, Plaintiff was represented by union representative Christopher Fox ("Fox") and by a union attorney. Prior to the hearing, Fox presented to Plaintiff a one-page negotiated stipulation drafted by NYCTA that reinstated Plaintiff to a non-safety-sensitive position upon two conditions: Plaintiff must admit that he was a second-time offender n2 testing positive for drugs and must enter a drug rehabilitation program without pay. (NYCTA Not. of

Mot. Ex. 12.) The stipulation also included a release by Plaintiff and TWU of all claims they had against NYCTA arising out of the disciplinary action.

Fox told Plaintiff that signing the agreement would allow him to regain employment with NYCTA, and that in his opinion, the arbitrator would be compelled to sustain Plaintiff's dismissal because Plaintiff could not produce the urine sample and was unable to provide medical documentation of his shy bladder. (Pilecki Aff. Ex. L, at 25-27.) Plaintiff attempted to call his wife in order to consult with her, but she was not home. He neither attempted to call anyone else nor expressed to union officials that he wished to place another call or delay the arbitration hearing. (Pilecki Aff. Ex. K, at 34-35.)

After approximately one-half hour, Plaintiff signed the stipulation. He states in his deposition that he did so in order to retain his job and health benefits, especially because he has a son who suffers from congenital heart disease, a condition requiring constant medical attention. (Pilecki Aff. Ex. K, at 35, 74.) Plaintiff states that he was under the impression that the Tripartite Arbitration Board had already decided to dismiss him before the hearing began. (Pilecki Aff. Ex. K, at 33.) He also claims that Fox told him that if he did not sign the stipulation within five minutes, the offer would be withdrawn. (Pilecki Aff. Ex. K, at 37, 80.) Fox claims that he told Plaintiff that he would represent him at arbitration if Plaintiff chose not to execute the stipulation. (Pilecki Aff. Ex. L, at 26.)

Pursuant to the stipulation, Plaintiff entered NYCTA's drug treatment program, known as the Employee Assistance Program ("EAP"). While in EAP, Plaintiff allegedly discovered that other safety-sensitive employees who are not of Asian descent and who either refused to take an NYCTA drug test or tested positive

for drugs were permitted to maintain their safety-sensitive positions upon completion of EAP. (Kwok Aff. P 20.) As a result, Plaintiff contacted TWU to complain in November 1997 and was allegedly promised "that something will happen." (Kwok Aff. P 21.) In December 1998, two union representatives informed Plaintiff that they would not challenge the stipulation. Plaintiff believes that despite TWU's assurances, the union failed to pursue his claim between November 1997 and December 1998. (Kwok Aff. at P 21.) Plaintiff now holds a permanent non-safety position with NYCTA as a cleaner at a salary substantially lower than his previous one.

On March 26, 1999, Plaintiff initiated this action against NYCTA and TWU. Plaintiff claims that he signed the stipulation of demotion under duress. Plaintiff further claims that he has a Fourteenth Amendment property interest in the benefits of his permanent position as a train operator and a liberty interest in his reputation as a drug-free employee. He argues that NYCTA deprived him of these interests on the one hand by improperly subjecting him to the FTA regulations during his drug testing, and on the other hand by misapplying those regulations. He also claims that NYCTA treated him worse than non-Asian employees who have refused drug tests or tested positive for drugs. Finally, Plaintiff claims that TWU failed to adequately represent him, and that TWU and James violated their fiduciary duties toward him.

II. DISCUSSION

A. CLAIMS AGAINST NYCTA

Plaintiff claims that NYCTA and TWU forced him to enter into the stipulation of settlement under economic duress. To prove economic duress, Plaintiff must

demonstrate that a wrongful threat precluded the exercise of his free will and caused him to involuntarily accept the terms of the stipulation. See, e.g., *DuFort v. Aetna Life Ins. Co., 818 F. Supp. 578, 582 (S.D.N.Y. 1993); Austin Inst., Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 536, 324 N.Y.S.2d 22 (N.Y. 1971).* As an initial matter, the offer of settlement was not required under the CBA. Therefore, even assuming that NYCTA's offer of the stipulation was valid only for a short period of time before arbitration began, "a threat to do that which one has the right to do does not constitute duress." *Dufort, 818 F. Supp. at 582* (citing *Gerstein v. 532 Broad Hollow Road Co., 75 A.D.2d 292, 429 N.Y.S.2d 195, 199 (App. Div. 1980)).*

Moreover, Plaintiff's deposition testimony demonstrates that no threats were made in order to force him to sign the stipulation. n3 NYCTA agents were not present when Plaintiff and Fox were discussing the stipulation. Therefore, there is no indication that any agents of NYCTA coerced Plaintiff. Furthermore, Plaintiff indicates that Fox and his union attorney presented Plaintiff with the choice of either signing the stipulation or facing the possibility of dismissal at arbitration. (Pilecki Aff. Ex. K, at 80.) For example, Plaintiff stated, "I elected to have benefits so my family would be protected" and "[I] made the choice" to take the job. (Pilecki Aff. Ex. K, at 37-38.) It is evident that rather than face potential termination for failure to provide a urine sample, Plaintiff exercised his free will and chose a more attractive option, which was to sign an agreement guaranteeing his employment. See *Spencer v. New York City Transit Auth., 1999 U.S. Dist. LEXIS 408,* No. 95- *CV-4779, 1999 WL 51814,* at *12 (E.D.N.Y. Jan. 14, 1999).

By signing the stipulation, Plaintiff released "any and all claims, whether at law, in equity or arising by virtue

of contract which [Plaintiff] may have or which [Plaintiff] may have had heretofore in connection with underlying disputes in [this disciplinary action]." (Pilecki Aff. Ex. H.) In addition to his duress argument, Plaintiff seeks to challenge the methods by which his drug testing was conducted and he also argues that he was treated differently than similarly situated employees. NYCTA asserts that the release contained in the stipulation bars Plaintiff's claims. Plaintiff contends that the release was insufficient to waive his federal constitutional claims. A waiver of constitutional rights under § 1983 must be knowing and voluntary. Factors to be considered include the plaintiff's education and experience, the amount of time the plaintiff was given to review the release, the plaintiff's role in negotiating the waiver, the clarity of the agreement, whether the plaintiff was represented by an attorney, and whether the consideration given in exchange for the release exceeds employee benefits to which the plaintiff was already entitled. See, e.g., *Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine, 833 F. Supp. 1089, 1096-97 (S.D.N.Y. 1993); Knight v. State of Conn., 2000 U.S. Dist. LEXIS 21120,* No. 3:97 CV2114, 2000 WL 306447, at *7 (D. Conn. Feb. 22, 2000). A release of constitutional claims is evaluated according to the totality of the circumstances, and all factors need not be satisfied in order to find a release enforceable. See *Bormann v. AT&T Communications, Inc., 875 F.2d 399, 403 (2d Cir. 1989).*

As noted above, Plaintiff demonstrated in his deposition testimony that he exercised a deliberate choice to enter into the stipulation. (Pilecki Aff. Ex. K, at 80.) It is undisputed that Plaintiff was aware that he was settling his grievance in exchange for employment at NYCTA, and that by entering into the stipulation, Plaintiff received more than he was entitled to under the CBA. The language of the stipulation is clear and

unambiguous, and the agreement is only one page in length. Plaintiff signed the stipulation after he considered it for one-half hour and after it was explained to him by union counsel. (Pilecki Aff. Ex. L, at 62.) Considering all of the circumstances surrounding the execution of the release, it is evident that Plaintiff knowingly and voluntarily waived any claims he had against NYCTA arising from his demotion. See *Prunella v. Carlshire Tenants, Inc., 94 F. Supp. 2d 512, 517 (S.D.N.Y. 2000)*. Therefore, Plaintiff's remaining Due Process and Equal Protection claims are dismissed.

B. CLAIMS AGAINST TWU AND JAMES

Plaintiff claims that TWU breached its fiduciary duty and its duty to fairly represent Plaintiff by coercing him into signing the stipulation and by refusing to respond to Plaintiff's complaint relating to his discovery that NYCTA allegedly punished him more severely than non-Asians who refused testing or tested positive for drugs or alcohol. n4 Plaintiff further claims that James breached his fiduciary duty to Plaintiff by failing to insure that his designees represented Plaintiff fairly and effectively, and by failing to protect Plaintiff's interests against NYCTA.

In order to prevail on a claim for breach of the duty of fair representation, Plaintiff must demonstrate that (1) the actions of TWU were arbitrary, discriminatory, or in bad faith, and (2) that these actions "seriously undermined the arbitral process." *Vaca v. Sipes, 386 U.S. 171, 190, 87 S. Ct. 903, 916, 17 L. Ed. 2d 842 (1967); Barr v. United Parcel Serv., Inc., 868 F.2d 36, 43 (2d Cir. 1989)*. To meet the first prong of this test, Plaintiff must establish that the conduct of Fox and his union attorney amounted to either an intentional breach of the duty of fair representation or was "so egregious, so far short of minimum standards of fairness to

[Plaintiff] and so unrelated to the legitimate union interests." *NLRB v. Local 282, Intern. Broth. of Teamsters, 740 F.2d 141, 147 (2d Cir. 1984).*

First, any claim relating to the execution of the stipulation is barred by the four-month statute of limitations contained in C.P.L.R. 217(2)(a), since Plaintiff signed the stipulation one year and four months before initiating this suit. Even were his claim not barred, Plaintiff has failed to establish that Fox or his union attorney engaged in egregious or bad faith conduct when they offered and recommended the stipulation to Plaintiff. A settlement of a grievance short of arbitration that is made in good faith does not constitute a breach of the duty of fair representation. See *Vaca, 386 U.S. at 191, 87 S. Ct. at 918.* As noted above, there is no evidence that Fox or the union attorney coerced Plaintiff into executing the stipulation, nor does Plaintiff proffer any evidence to indicate that TWU induced the stipulation in bad faith or to intentionally thwart Plaintiff's rights. On the contrary, the evidence shows that TWU's agents were willing to represent Plaintiff at arbitration, and that Fox properly performed his duty of fair representation by advising Plaintiff of his options. As Plaintiff concedes, the stipulation was presented as a "way of saving [his] job." (Pilecki Aff. Ex. K, at 32.)

Plaintiff also claims that between November 1997 and December 1998, TWU failed in bad faith to pursue his claim of disparate treatment. A union breaches the duty of fair representation when it "arbitrarily ignore[s] a meritorious grievance or processes it in a perfunctory fashion." *Vaca, 386 U.S. at 191, 87 S. Ct. at 917.* Here, because Plaintiff released all claims against NYCTA when he entered into the stipulation on November 18, 1997, Plaintiff possessed no viable claims against NYCTA that TWU or James could pursue. Furthermore,

although Plaintiff vaguely alludes to a promise by an unidentified union employee that "something will happen, " he offers no other substantive facts indicating bad faith by the union.

Finally, Plaintiff fails to establish that James breached his fiduciary duty under N.Y. Civil Service Law § 209-a, which creates a cause of action for a breach of the duty of fair representation by an employer and employee organization. Plaintiff cites no authority demonstrating that a union member may sue a union official in his individual capacity under this provision. Moreover, Plaintiff offers only conclusory allegations that James failed to insure that his designees effectively represented Plaintiff, failed to protect Plaintiff's interests against NYCTA, or that James was negligent in exercising his fiduciary duty. In any event, the record establishes that Plaintiff received adequate representation. Therefore, Plaintiff has failed to substantiate his individual claims against James.

III. CONCLUSION

For the foregoing reasons. Defendants' motions for summary judgment are granted. TWU's request for attorneys' fees is denied because it cites no authority in support of its request.

SO ORDERED.

Dated: New York, NY

July 20, 2001

JOHN S. MARTIN, JR., U.S.D.J.

----------Footnotes----------

n1 Plaintiff's wife submits an affidavit in which she states that Plaintiff normally takes between five and eight minutes to urinate. (K. Kwok Aff. P 5.) Mrs. Kwok equates her husband's shy bladder to "situational anxiety," which the FTA regulations specifically provide will not excuse a failure to produce urine. See *49 C.F.R. § 40.25(f)(10)(iv)(B)(1).*

n2 A second-time offender is an NYCTA employee who has tested positive for drugs or alcohol on a previous occasion. According to the CBA, a second-time offender shall be dismissed from service and will not be restored to civil service status. However, if an employee tests positive more than one year after he or she has completed NYCTA's drug treatment program for his or her first positive drug or alcohol test, that employee may be restored to a non-safety-sensitive position upon a second completion of NYCTA's drug treatment program. (Pilecki Aff. Ex. D.)

n3 And a possible motive for doing so remains unclear.

n4 Under New York law, breach of fiduciary duty and breach of the duty of fair representation are tested under the same standard. See *Coleman v. City of New York, 1999 U.S. Dist. LEXIS 19373*, No. 99- *CV-1159, 1999 WL 1215570*, at *2 n.1 (E.D.N.Y. Dec. 7, 1999); *Albert v. City of New York, 103 Misc. 2d 962, 431 N.Y.S.2d 240, 242 (Sup. Ct. 1980).* Therefore, Plaintiff's breach of fiduciary duty claim will not be addressed individually.

No. 01-9006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH F. KWOK,
Plaintiff-Appellant,

v.

NEW YORK CITY TRANSIT AUTHORITY, TRANSPORT WORKERS' UNION, Local 100/AFL-CIO and WILLIE JAMES, President of Local 100/TWU, Defendants-Appellees,

THE CITY OF NEW YORK,
Defendant.

12/11/02

ORDER

A petition for panel rehearing and a petition f or rehearing en bane having been filed herein by the appellant Kwok.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B.
MACKECHNIE, Clerk

Supreme Court U.S.
JUN 0 3 2003
OFFICE OF THE CLERK

No. 02-1504

In the
Supreme Court of the United States

JOSEPH F. KWOK,

Petitioner,

vs.

NEW YORK CITY TRANSIT AUTHORITY, TRANSPORT WORKERS' UNION, Local 100/AFL-CIO, and WILLIE JAMES, President of Local 100/TWU,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT NEW YORK CITY TRANSIT AUTHORITY'S BRIEF IN OPPOSITION

RICHARD SCHOOLMAN
Counsel of Record
DANIEL TOPPER
OFFICE OF THE GENERAL COUNSEL
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, New York 11201
(718) 694-4667

Attorneys for Respondent
New York City Transit Authority

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Respondent New York City Transit Authority requests that this Court deny the petition for a writ of certiorari filed by Joseph F. Kwok, a former employee of the Transit Authority's, seeking review of a summary order of the Court of Appeals for the Second Circuit that affirmed the judgment of the United States District Court for the Southern District of New York. The district court had granted summary judgment dismissing Mr. Kwok's complaint as against the Transit Authority on the grounds that he had "knowingly and voluntarily waived any claims he had against" the Transit Authority. Pet. 13a.

Counter-Statement of the Case

Mr. Kwok had been a subway "train operator" employed by the Transit Authority. As such, he was required, by regulations promulgated by the Untied States Department of Transportation, to be tested for drugs. That test required him to provide a urine specimen of at least 45 ml. (approximately 1.5 oz.) within a three-hour period. Under the federal regulations, a tested employee's failure to provide that minimum amount of urine — unless the failure was deemed by a "medical review officer" to have been a result of a medical condition — would cause the employee to be designated a "refusal" for test purposes. Mr. Kwok was tested (on October 15, 1997), failed to provide a sufficient sample of urine, did not submit any evidence of a medical condition preventing sufficient urination, and (on October 23, 1997) was ultimately deemed by the Transit Authority's medical review officer to be a "refusal."

A Transit Authority employee's being designated as a test "refusal" has several consequences. Under the regulations, the Transit Authority "shall require that [the] employee cease performing a safety-sensitive function" (49 C.F.R. § 653.35(a)) — in this instance, operating a subway train — and the employee may not return to that kind of work until cleared

to do so by a "substance abuse professional" (49 C.F.R. §§ 653.49, 653.63). Under the Transit Authority's own rules, a "refusal" is also considered a kind of insubordination, that is, a disciplinary violation, for which dismissal from employment may be sought; and the Transit Authority sought Mr. Kwok's dismissal. Because Mr. Kwok challenged that discipline, the matter of the appropriate discipline was grieved under the grievance-to-arbitration procedures negotiated into the collective bargaining agreement between the Transit Authority and the labor union representing Mr. Kwok, Local 100 of the Transport Workers Union ("TWU"); the final step of those procedures, if the TWU requests it, is arbitration.

In Mr. Kwok's case, the TWU requested arbitration and a hearing was scheduled. The Transit Authority, in an effort to settle the matter (and so avoid the costs and uncertainties of the arbitration process), proposed to the TWU that the grievance be resolved by Mr. Kwok's agreeing to participate in an Employee Assistance Program and to accept a demotion to a non-safety sensitive position; in return, Mr. Kwok would waive or release all claims he might otherwise have against the Transit Authority related to this drug testing issue (and stay employed, thus avoiding possible dismissal if the arbitrator were to rule against him). The Transit Authority prepared, and gave to the TWU, a stipulation to that effect. The TWU, by one of its field representatives and one of its attorneys, explained the stipulation to Mr. Kwok shortly before the arbitration was to begin, and he signed it on November 18, 1997.

There is no dispute that the Transit Authority lived up to its obligations set out in the stipulation. Mr. Kwok, however, after participating in an Employee Assistance Program and returning to work for the Transit Authority (in a demoted, non-safety sensitive, position), in 1999 sued the Transit Authority for supposedly violating his Fourteenth Amendment constitutional rights to due process and equal protection

(utilizing the vehicle of 42 U.S.C. § 1983) in the way the Transit Authority handled his drug test and demoted him. In so doing, Mr. Kwok violated his agreement in the stipulation that he was waiving or releasing all claims he might have had to bring such a suit.

In a decision (not officially reported) dated July 20, 2001, the district court granted summary judgment dismissing Mr. Kwok's claims against the Transit Authority.[1] That court, reviewing the deposition testimony of Mr. Kwok and other evidence, concluded that his signed waiver of his rights to bring this lawsuit against the Transit Authority — in the "totality of the circumstances" — was "knowing and voluntary" (Pet. 12a). Dismissal of Mr. Kwok's claims was therefore necessary.

The Court of Appeals for the Second Circuit, in an unreported summary order, affirmed "substantially for the reasons stated in the District Court's thorough Opinion and Order of July 20, 2001." Pet. 2a.

In his petition for a writ of certiorari, Mr. Kwok argues that this Court should resolve what he perceives to be a conflict among the Courts of Appeals about the proper standard that a court should use to determine whether an individual's waiver of constitutional (or federal statutory) rights is knowing and voluntary, and thus enforceable. In the Second Circuit, as illustrated by the district court's decision in this case and, for instance, in *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989), the "totality of the circumstances" standard has been used. *See also, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 12 (1st Cir. 1997). Other courts have used an "ordinary contract principles" standard. *See, e.g., O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir.),

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[1] Mr. Kwok had also asserted claims against his union, that is, the TWU, and the district court dismissed them (on different grounds).

cert. denied, 502 U.S. 859 (1991); *Runyon v. National Cash Register Corp.*, 787 F.2d 1039, 1044 n.10 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986); *Todd v. Blue Ridge Legal Services, Inc.*, 175 F. Supp.2d 857, 862 (W.D. Va. 2001). Mr. Kwok seeks to ask this Court to decide that the "ordinary contract principles" standard (which he thinks Congress, through the Older Workers Benefit Protection Act amendment, codified at 29 U.S.C. § 626(f), to the Age Discrimination in Employment Act, came to impose for assessing waivers of rights under the latter Act ("ADEA")) should be applied by the judiciary, instead of the "totality of the circumstances" standard, to assess the validity of individual waivers of constitutional rights where, as here, Congress has specified no specific standard.

This, *Kwok*, case, however, is not a suitable case to resolve the difference of views among the Courts of Appeals on this subject, and the petition should be denied.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari in this case should be denied because the difference in standards for reviewing waivers of federal constitutional or statutory rights to determine whether the waivers were knowing and voluntary and thus valid and enforceable — that is, the "totality of the circumstances" standard versus the "ordinary contract principles" standard — would make no difference for the outcome of this case. That is because the "totality of the circumstances" standard for reviewing the validity of such waivers has been generally understood, by courts on both sides of the question, to be the "more stringent" standard for approving the validity or enforceability of a particular waiver. *See, e.g., O'Shea*, 930 F.2d at 361-62 (while choosing to use "ordinary contract principles" standard, court notes that the "totality of the circumstances" standard is "more stringent"); *Bormann*, 875 F.2d at 403 (declining to utilize "ordinary contract principles" test and choosing "totality of the circumstances"

standard, court notes that the latter is "apparently more stringent"). *See also Nicholas v. NYNEX*, 929 F. Supp. 727, 730 (S.D.N.Y. 1996) (The "totality of the circumstances" standard "is somewhat more stringent than the analysis called for under ordinary contract law, for determining whether a release of discrimination claims was executed knowingly and voluntarily.").

In other words, it is harder for a court to uphold a waiver under the "totality of the circumstances" standard than under the "ordinary contract principles" standard. And thus, where (as here) the district court concluded that the waiver that the petitioner, Mr. Kwok, signed should be upheld and enforced, under the "totality of the circumstances" standard, *a fortiori* the waiver would have been upheld under the "ordinary contract principles" standard. That means that, even if this Court were to grant Mr. Kwok's petition, and go on to authorize the "ordinary contract principles" standard, Mr. Kwok's waiver would have to be upheld. He would still lose his case, as a matter of law, and that would effectively make this petition a request for an advisory opinion from this Court, useful perhaps for other cases but not for this one. The petition should, accordingly be denied.

Petitioner is also under a misimpression about the standard that Congress wished utilized for assessing the enforceability or validity of waivers under the ADEA. While there had been some variation of views about the matter, Congress, by statute, resolved the question legislatively, effective October 16, 1990, in favor of the "totality of the circumstances" standard. *See, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1465 (4th Cir. 1996) ("In enacting OWBPA [i.e., the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)] Congress essentially codified the 'totality of the circumstances' test, rejecting application of ordinary state law contract principles in determining whether a release agreement [that waived ADEA claims] is valid.") Petitioner therefore is

mistaken in his premise that this Court, were it to grant his petition and address the merits of his argument, would adopt Congress's approach to waivers of ADEA claims and so would reject the "totality of the circumstances" standard and adopt the "contract principles" one; the opposite, rather, would be true, and that would doom his chance for success in this litigation. His petition, for this reason as well, should be denied.

Conclusion

The petition, to the extent addressed to claims against the New York City Transit Authority, should be denied.

Dated: June 3, 2003

Respectfully submitted,

RICHARD SCHOOLMAN
Counsel of Record
DANIEL TOPPER
OFFICE OF THE GENERAL COUNSEL
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, New York 11201
(718) 694-4667

Attorneys for Respondent
New York City Transit Authority